United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1098

To be argued by
FRANK H. WOHL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1098

UNITED STATES OF AMERICA,
Appellee,

—v.—

IRVING BEHRMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Irving Behrman appeals from a judgment of conviction entered on February 23, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 75 Cr. 298 was filed in two counts on March 21, 1975 charging Behrman with filing false personal income tax returns for the tax years 1968 and 1969, in violation of Title 26, United States Code, Section 7206(1).

The trial commenced on December 5, 1975. On December 9, 1975 the jury returned a verdict of guilty on both counts.

On February 23, 1976 Behrman was sentenced to concurrent terms of six months' imprisonment and three

years' supervised probation on each of the two counts and fined $2500 on each count. Behrman remains at large pending this appeal.

Statement of Facts

The Government's Case

In the mid-1960's Behrman was in the business of selling imported plastic flowers and foliage. (Tr. 47).* Two of his customers were Wagner-Nelson, Inc. of Houston, Texas and Charles Gilman Imports of New York City. Behrman ordinarily acted as a representative of United Flowers, a company of which he was an owner. (Tr. 47, 161). From May 1968 until January 1969 Behrman was an employee of Charles Gilman Imports which took over the inventory of United Flowers. (Tr. 162-64).

Around the end of 1967 Behrman sold Charles Gilman some artificial flowers at a low price and asked him to make the payment checks payable to Harold Roth. (Tr. 167-68). Gilman complied with this request (Tr. 168; GXs 222-24), delivering to Behrman three checks in an aggregate amount of over $7000, each payable to Harold Roth.

At some time during the middle or late 1960s, Behrman told Curtis Wagner, President of Wagner-Nelson, Inc., one of Behrman's major customers, that he was selling goods for Harold Roth. (Tr. 48-49). Thereafter, Wagner-Nelson purchased goods through Behrman and paid for them with checks payable to Harold Roth. (Tr.

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* "Tr." refers to pages of the trial transcript. "GX" refers to government exhibits. "Br." refers to pages of Appellant's brief.

49-52). During 1968 Wagner-Nelson delivered to Behrman 33 checks payable to Harold Roth, in an aggregate amount of $109,644, and in 1969 Behrman received 18 such checks all payable in the name of Harold Roth totaling $51,509. (GXs 168-218).

Behrman endorsed the name Harold Roth on all of the Charles Gilman and Wagner-Nelson checks payable to Harold Roth and either cashed them or deposited them in a checking account which he had opened under the name Harold Roth at the Bank of Tokyo.* Still using the name Harold Roth, Behrman withdrew all of the funds from the Harold Roth account by writing checks payable to cash or to Harold Roth (GXs 47-141) and cashing them. (Tr. 39-5).

Behrman failed to report the receipt of any of these checks or cash to his tax return preparer (Tr. 19-23, 30, 32) or on his tax returns. (GXs 1 and 2).

The Defense Case

Behrman did not testify and he offered no evidence.

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* On opening the account on August 31, 1967, Behrman gave a home address and banking reference in Hong Kong and signed signature cards in the name Harold Roth. (GXs 3 and 4).

ARGUMENT

POINT I

The evidence of Behrman's guilt was sufficient.

The evidence of Behrman's guilt was not merely sufficient, it was overwhelming. The defense claim on appeal, that the government failed to prove unreported adjusted gross income, is flatly contradicted by the trial record and the applicable law.

Behrman rests much of his appellate attack on the proposition that the government failed to prove that the over $150,000 Behrman received was in payment for goods Behrman sold. The trial record reveals this defense claim to be wholly without foundation. The evidence clearly established that the money was paid to Behrman in exchange for artificial flowers which he sold to Wagner-Nelson, Inc. and Charles Gilman. Curtis Wagner testified unambiguously that he caused checks to be drawn payable to Harold Roth and delivered to Behrman in exchange for merchandise in the ordinary course of commercial dealings. (Tr. 48-59, 77, 81, 83, 95). This testimony was supported by the notation "foliage" which appeared on many of the vouchers which constituted portions of Government Exhibits 168-221. Charles Gilman also testified that the money he paid to Behrman in the form of checks payable to Harold Roth constituted payments for merchandise sold him by the defendant. (Tr. 167-69).

Behrman also argues that the Government failed to establish that the money received by the defendant constituted adjusted gross income because the Government established only gross receipts, rather than profit, resulting from the defendant's activities while using the false name Harold Roth.

If the Government was required to prove that the defendant made a profit on the Harold Roth transactions,* the evidence clearly supported such a conclusion, as the jury found. The appearance of the transactions, Behrman's efforts to conceal them through the use of a false name, and his failure to inform his tax return preparer of them, constitute circumstantial evidence of the existence of a substantial profit which Behrman sought to conceal from the Internal Revenue Service. Here the jury was entitled to make the common sense observation that men ordinarily engage in such transactions out of a profit motive, and that the proof here revealed no circumstance showing absence of a profit, such as hard bargaining over price or statements by Behrman to his buyer that he was selling below cost. The jury was also entitled to infer that, had Behrman incurred a loss on these transactions, he would have reported that on his tax return to receive the tax benefits of the loss. In addition, the evidence here disclosed no reason for the defendant's use of a false name other than to defraud the Internal Revenue Service. *See Spies* v. *United States*, 317 U.S. 492, 499 (1943); *United States* v. *Terrell*, 390 F. Supp. 371, 377-78 (S.D.N.Y. 1975) (Weinfeld, *J.*).

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* The law is clear that, in order to establish a violation of Section 7206(1), the Government need not prove that the false statement made by the defendant on his tax return resulted in a tax deficiency. *See Schepps* v. *United States*, 395 F.2d 749 (5th Cir.), *cert. denied*, 393 U.S. 925 (1968), and *United States* v. *Raynor*, 204 F. Supp. 486 (S.D. Cal. 1962). It has been held that one who knowingly files an inaccurate tax return in the belief that the tax consequences of the inaccuracy will be minimal is guilty of a violation of Section 7206(1). *Silverstein* v. *United States*, 377 F.2d 269 (1st Cir. 1967). Accordingly, Behrman was obligated to include in his computation of his adjusted gross income the gross receipts he earned under the name of Harold Roth from the sale of artificial flowers.

Not surprisingly, this analysis finds support in the cases. The Court of Appeals for the Seventh Circuit, in affirming a tax evasion conviction observed,

> "The law is likewise clear that, once the Government proves unreported receipts having the appearance of income, and gives the defendant credit for the deductions he claimed on his return, as well as any others it can calculate without his assistance, the burden is on the defendant to explain the receipts, if not reportable income, and to prove any further allowable deductions not previously claimed." *United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970), cited with approval in *United States* v. *Slutsky*, 487 F.2d 832, 340 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

To the same effect is *Siravo* v. *United States*, 377 F.2d 469 (1st Cir. 1967) (Coffin, *J.*). There, the Government proved that the defendant had operated a company which assembled jewelry components, but despite substantial gross receipts, had not reported any income from this operation. The defendant argued, as Behrman argues here, that the Government had failed to introduce any testimony concerning the labor costs of the operation and therefore had not shown that labor costs could not have offset gross receipts. Affirming a conviction for failure to file a tax return, the Court stated:

> "We do not agree that the Government has any such burden. The applicable rule here is that uniformly applied in tax evasion cases—that evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses if any . . . Indeed, this case is necessarily included in that rule. For in a tax evasion case the Govern-

> ment's ultimate burden is to show that the taxpayer received not only gross income but also taxable income, after deduction of capital *and* non-capital expenses. If that is satisfied by proof of sales receipts, absent explanation, so must be the lesser burden here." 377 F.2d 469, 473-74.

See also United States v. *Leonard*, 524 F.2d 1076, 1083 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Slutsky*, *supra*, 487 F.2d at 840; *United States* v. *Bender*, 218 F.2d 869 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955); *United States* v. *Hornstein*, 176 F.2d 217, 220 (7th Cir. 1949).

Defense counsel also advances several other imaginary innocent explanations of Behrman's receipt of this money. He suggests that the payments may have been loans (Br. 11), or a return of capital (Br. 12), or that Behrman may have been acting as a conduit. (Br. 11). These theories, while perhaps evidence of defense counsel's fertile imagination, find no support whatsoever in the record. Although Gilman testified that he had occasionally loaned Behrman money to cover Behrman's gambling expenses (Tr. 195-98, 236-42), he testified quite clearly that the payments in question were for goods sold, not loans. (Tr. 167-69). There was no evidence that Curtis Wagner or Wagner-Nelson, Inc. loaned Behrman any money, or that this money might be a return of capital, or that Behrman received it as a conduit. Defense counsel also theorizes that Behrman may have filed a tax return under the name Harold Roth reporting these receipts as income. (Br. 20). Again, the record offers not even a hint of any such irregular event.

Defense counsel offers these fanciful explanations based on the implicit assumption that it is part of the

government's obligation to joust with every windmill defense counsel's fancy can erect. Both law and common sense teach, however, that the government is required to disprove only defenses actually raised by the evidence. Where, as here, "the government has introduced sufficient evidence from which the jury could conclude with reasonable certainty that [the money received by the defendant was income in character], the defendant remains silent at his own peril." *United States* v. *Bianco*, Dkt. No. 75-1244 (2d Cir. April 8, 1976), slip op. 3099, 3105. Here, of course, Behrman presented no defense and offered no evidence.

In *United States* v. *Leonard*, *supra*, 524 F.2d at 1083, this Court rejected a defense claim, based on facts more favorable to the defense than those presented by this record, that it was not necessary to instruct the jury on a defense closely analogous to the return of capital suggestion advanced on appeal here; and in *United States* v. *Gross* 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961) this Court rejected a conduit claim much more plausible than that urged here. *See also United States* v. *Steinberg*, 525 F.2d 1126, 1132 (2d Cir. 1975); *United States* v. *Clark*, 498 F.2d 535, 537 (2d Cir. 1974); *Yarborough* v. *United States*, 230 F.2d 56, 61 (4th Cir. 1956); *cf. United States* v. *Breitling*, 61 U.S. (20 How.) 252, 254-55 (1858); *United States* v. *Carroll*, 510 F.2d 567, 509 (2d Cir. 1975); *Morris* v. *United States*, 326 F.2d 797, 808 (7th Cir. 1956), *aff'd*, 353 U.S. 373 (1957).

In this context, the prosecutor's rebuttal summation comments were clearly a proper response to defense counsel's arguments about theories the Government had failed to disprove. *United States* v. *Tramunti*, 513 F.2d 1087, 1119 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

POINT II

The District Court's charge that the jury could infer unreported income from the proof of unreported receipts was clearly proper.

In light of the settled rule that proof of unreported receipts shifts to the defense the burden of coming forward with an innocent explanation, Behrman's attack on the court's charge that such proof of unreported receipts would permit the jury to infer unreported income, is frivolous; and his reliance on the broad language of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *In Re Winship*, 397 U.S. 358 (1970) falls far wide of the mark. *Wilbur* and *Winship* do not focus on the question presented here, the propriety of the government's reliance on inferences to establish its case. In those cases the Court found constitutionally invalid the use of a standard less exacting than beyond a reasonable doubt on critical determinations in criminal and quasi-criminal cases. No such issue is raised in this case.* More in point here is *Barnes* v. *United States*, 412 U.S. 837 (1973) in which the use of another inference, of guilty knowledge from unexplained possession of recently stolen property, was upheld. Indeed, in *Wilbur* the Court referred to such presumptions and inferences as entirely proper methods by which the prosecution may prove its case. 421 U.S. at 702-03 n.31. Accordingly, the presumption described in *United States* v. *Lacob*, 416 F.2d 756 (7th Cir. 1969), *cert. denied*, 396 U.S.

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* The court's charge here made clear to the jury that the burden of persuasion never shifted to the defendant and that to convict the Government was required to establish to the jury's satisfaction beyond a reasonable doubt each element of the offense charged. *Cf. Mullaney* v. *Wilbur, supra*, 421 U.S. at 701.

1059 (1970) and *Siravo* v. *United States*, 377 F.2d (1st Cir. 1967) is in no way vitiated by *Winship* or *Wilbur*. *See also Cupp* v. *Naughton*, 414 U.S. 141, 148-49 (1973).

Like *Barnes* and *Stubbs* v. *Smith*, Dkt. No. 75-2124 (2d Cir. April 2, 1976), slip op. 2913, 2923-25, this case does not require the Court to determine which test (beyond-a-reasonable-doubt, more-likely-than-not or rational-connection) a permissive inference must meet in order to satisfy the Due Process standard, since the inference here, that hundreds of thousands of dollars in unreported and unexplained gross receipts resulted in profits to the recipient, passes the reasonable doubt standard; and the jury was instructed that it must find such profit beyond a reasonable doubt. (Tr. 398).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Thelma Wilkinson being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of May 1976 she served a copy of the within Brief for U.S. by placing the same in a properly postpaid franked envelope addressed:

Irving Anolik
225 Broadway
New York, NY 10007

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thelma E. Wilkinson

Sworn to before me this

17th day of May 1976

Olga C. Gramp

OLGA C. GRAMPP
Notary Public, New York State
No. 43-4622036
Qualified in Richmond Cty.
Comm. Expires March 30, 1977